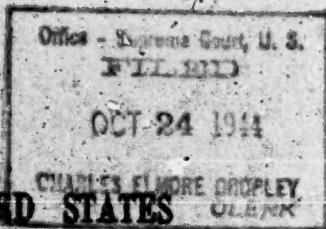




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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1944**

**No. 630**

**THE BARRETT LINE, INC.,**

*Appellant,*

*vs.*

**THE UNITED STATES OF AMERICA, INTERSTATE  
COMMERCE COMMISSION AND MISSISSIPPI VAL-  
LEY BARGE LINE CO., ET AL.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE SOUTHERN DISTRICT OF OHIO**

**STATEMENT AS TO JURISDICTION**

**CHARLES H. STEPHENS, JR.,**

**ROBERT E. QUIRK,**

*Counsel for Appellant.*



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**UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF OHIO,  
WESTERN DIVISION**

**Civil Action No. 881**

Filed September 21, 1941

**THE BARRETT LINE, INC.,**

*vs.*

*Plaintiff,*

**THE UNITED STATES OF AMERICA, AND INTER-  
STATE COMMERCE COMMISSION,**

*Defendants*

**JURISDICTIONAL STATEMENT BY PLAINTIFF  
UNDER RULE 12 OF THE REVISED RULES OF  
THE SUPREME COURT OF THE UNITED STATES.**

The plaintiff-appellant respectfully presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or decree in the above-entitled cause sought to be reviewed.

**A. Statutory Provisions**

The statutory provisions believed to sustain the jurisdiction are:

U. S. C., Title 28, Section 47a (Act of March 3, 1911, c. 231, sec. 210, 36 Stat. 1150; as amended by Urgent Deficiencies Act of October 22, 1913; c. 32, 38 Stat. 220).



U. S. C., Title 28, Section 41 (28) (Act of June 18, 1910, c. 309, 36 Stat. 539; as amended March 3, 1911, c. 231, sec. 207, 36 Stat. 1148; October 22, 1913, c. 32, 38 Stat. 219).

U. S. C., Title 28, Section 44 (Act of October 22, 1913, c. 32, 38 Stat. 220; as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

U. S. C., Title 28, Section 47 (Act of October 22, 1913, c. 32, 38 Stat. 220).

U. S. C., Title 28, Section 345 (Act of March 3, 1891, c. 517, sec. 5, 26 Stat. 827; as amended January 20, 1897, c. 68, 29 Stat. 492; April 12, 1900, c. 191, sec. 35, 31 Stat. 85; April 30, 1900, c. 339, sec. 86, 31 Stat. 158; March 3, 1909, c. 269, sec. 1, 35 Stat. 838; March 3, 1911, c. 231, secs. 238, 244, 36 Stat. 1157; January 28, 1915, c. 22, sec. 2, 38 Stat. 804; February 13, 1925, c. 229, sec. 1, 43 Stat. 938).

## **B. The Statute of a State, or the Statutes or Treaty of the United States, the Validity of Which Is Involved**

The validity of a statute of a state, or of a statute or treaty of the United States, is not involved.

## **C. Date of the Judgment or Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Was Presented**

The decree sought to be reviewed was entered July 28, 1944. The petition for appeal, together with the assignment of errors, was presented September 15, 1944, and was allowed September 15, 1944.

## **D. Nature of Case and of Rulings**

This is an appeal from a final decree of the United States District Court for the Southern District of Ohio, Western Division, which sustained an order of the Interstate Commerce Commission of June 18, 1943, in Docket W-353, *Bar-*

*rett Line Inc., Contract Carrier Application*, 250 I. C. C. 809. In sustaining the order of the Commission the court below held that the Commission had not misconstrued or misapplied the applicable statute and had not acted arbitrarily in entering the order.

The question presented is whether the court below erred in sustaining the order of the Commission in which the Commission declined to issue a permit to the appellant, which is a contract carrier by water and has been operating as such on the Ohio and Mississippi Rivers and their tributaries for four generations. The appellant seasonably filed an application with the Commission for a permit under the so-called "grandfather" provisions of section 309 (f) of the Interstate Commerce Act and the provisions of section 300 (g) of that act, which deals with the issuance of permits covering new operations. These applications were consolidated and were disposed of by the Commission in one report and on one record.

The appellant performs a towboat service and a barge service. It also performs a freighting service with its own barges, and a towing business on barges owned by others. In addition, it does a chartering business that contemplates the handling of both freight and the supplying of equipment to persons doing chartering. During the period covered by the record before the Commission, the appellant was engaged principally in the transportation of petroleum products in bulk. Under section 303 (b) of the Interstate Commerce Act the transportation by water of commodities in bulk under the conditions described therein, is exempt from the provisions of Part III of the Interstate Commerce Act. However, under section 302 (c) of the act, the furnishing for compensation of a vessel "to a person other than a carrier subject to this act, to be used by the person to whom such vessel is furnished in the transportation of its own property, shall be considered to constitute, as to the vessel



so furnished, engaging in transportation for compensation by the person furnishing such vessel, within the meaning of the foregoing definition of 'contract carrier by water.' The same section provides that the term contract carrier by water means any person which under individual contracts or agreements engages in the transportation "by water of passengers or property in interstate or foreign commerce for compensation."

The evidence before the Commission shows that the appellant and its predecessor have been engaged as a contract carrier by water in the transportation of general cargo on the Ohio and other rivers for more than four generations, and that during the years 1936 to and including August, 1942, appellant engaged in 23 chartering transactions under which it leased or chartered its vessels to various persons, none of whom are carriers subject to the Interstate Commerce Act. By the plain terms of the statute, these chartering transactions are defined as constituting the engagement in transportation as a contract carrier by water. The appellant's tariff, which was filed with the Commission and published in the manner required by its rules and regulations, contains its minimum charges. The tariff provides that appellant will contract to transport all commodities in barges in lots of not less than 500 net tons. Appellant's operations are special in the highest degree. It serves customers under special contracts. It is an irregular operator of river craft.

The examiner of the Commission who heard the evidence served a report in which he found that a permit should be granted to appellant under the provisions of section 309 (g) of the Interstate Commerce Act. The Commission reversed the examiner and held that the appellant was not entitled to a permit either under the "grandfather" provisions of section 309 (f) or under the new operation provisions of section 309 (g). This action was based upon the

conclusion by the Commission that on and since the "grandfather" date, January 1, 1940, the appellant had failed to establish that it was in bona fide operation in the performance of transportation subject to Part III of the act. This finding is contrary to the law and to the evidence. In addition, it disregards the plain provisions of section 302 (c), under which the Commission should have found as a minimum that the appellant was engaged in transportation as a contract carrier by water by virtue of its chartering transactions.

In considering the application under section 309 (g) which deals with future operations, the examiner had held that where, as here, the carrier had been engaged in business similar to that for which the permit is sought for a long period of time, consideration may and should be given to the historical background, to the character of service performed with respect to both regulated and unregulated traffic, and to the territory served, and that based on these considerations the Commission should conclude that the continued operation of the applicant will be consistent with the public interest and the national transportation policy.

The Commission reversed the conclusions of the examiner and held that the appellant was not entitled to a permit under the grandfather provisions of section 309 (f) or a permit under the provisions of section 309 (g) to establish new operations. This action was arbitrary and unreasonable. While transportation of petroleum products in bulk is not subject to Part III and while appellant, except for its chartering transactions, has been engaged principally in that character of transportation on and since the "grandfather" date, it has continued this character of service with the encouragement of the Office of Defense Transportation and the Petroleum Administrator. There is no gainsaying the fact that the transportation of petroleum products in barges during the present emergency has not only been in

the public interest, but in the interest of national defense as well.

It is difficult, if not impossible, to square the decision of the Commission in the instant case with its decision in *C. F. Harms Company Application*, 260 I. C. C. 171, with the *Russell Bros. Case*, 250 I. C. C. 429, and with its decision in *Moran Towing and Transfer Company Application*, made July 26, 1944, not yet reported.

The *Per Curiam* decision of the court below does not reveal the reasoning of the court, or the precise grounds on which the order of the Commission was sustained. The chartering transactions of the appellant are enough without more, to have subjected the appellant to the provisions of Part III of the Interstate Commerce Act and to have entitled it under the statute to a so-called "grandfather" permit since the statute section 302 (e) plainly provides that such transactions constitute the engaging in transportation for compensation within the meaning of the definition of a contract carrier by water, and since such a contract carrier by water who was in bona fide operation on the "grandfather" date and thereafter, as was the appellant, is entitled under the provisions of section 309 (f) to a permit upon the filing of an application and a showing that it was so engaged. Like the Commission, the court below ignored and disregarded this, as well as other, evidence and the provisions of the applicable statutes.

#### **E. Cases Sustaining the Supreme Court's Jurisdiction of the Appeal**

*United States v. Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 294 U. S. 499;

*United States v. Baltimore & Ohio Railroad Company*, 293 U. S. 454;

*Florida v. United States*, 282 U. S. 194;

*Beaumont, Sour Lake & Western Railway Company v. United States*, 281 U. S. 658;

*Ann Arbor Railroad Company v. United States*, 281 U. S. 658;

*Louisville & Nashville R. R. Co. v. United States*, 238 U. S. 14;

*Interstate Commerce Commission v. Union Pacific Ry. Co.*, 222 U. S. 541;

*New England Division Case*, 261 U. S. 184;

*Alton R. Co. v. United States*, 287 U. S. 229;

*United States v. Lowden*, 308 U. S. 225;

*Hudson & Manhattan R. Co. v. United States* 313 U. S. 98;

*Cornell Steamboat Company v. United States*, 64 S. Ct. 768.

#### **F. Opinion and Decree of the District Court**

Appended to this statement are: (1) the *Per Curiam* decision of the District Court, dated July 28, 1944; (2) the final decree of that court, and (3) the opinion of the Interstate Commerce Commission, Division 4, of June 18, 1943, since the District Court adopted as its own findings of fact and conclusions of law, the findings and conclusions of the Commission as made in that opinion.

For the reasons stated, it is respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal.

Dated September 19th, 1944.

(S.) CHARLES H. STEPPENS, JR.

*First National Bank Building*

*Cincinnati, Ohio*

(S.) ROBERT J. QUIRK,

*Investment Building*

*Washington, D. C.*

*Attorneys for Appellant.*

## APPENDIX "A"

UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF OHIO, WESTERN DIVISION

No. 881

(Cincinnati)

THE BARRETT LINE, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE  
COMMISSION, Defendants.

DECISION—Filed July 28, 1944

Before Allen, Circuit Judge, and Nevin and Druffel, District  
Judges

PER CURIAM:

The Court is of opinion that the Interstate Commerce Commission did not misconstrue the applicable statute, nor misapply it, and that its action herein has been in conformity with its statutory authority.

The Order of the Commission was entered after a full and fair hearing. The Commission did not abuse its discretion, nor act arbitrarily in entering its Order. The complaint herein should be dismissed at plaintiff's costs.

The Court adopts as its own findings of fact and conclusions of law, without repetition here, the findings and conclusions of Division 4 of the Interstate Commerce Commission, as set forth in its decision June 18, 1943, in proceeding No. W-353, and the conclusion of the Interstate Commerce Commission in its order in the same proceeding entered on December 6, 1943.

Accordingly, the Court has entered an Order dismissing the complaint at plaintiff's costs.

(S.) FLORENCE E. ALLEN,

*Judge, United States Circuit Court of Appeals.*

(S.) ROBERT R. NEVIN,

*Judge, United States District Court.*

(S.) JOHN H. DRUFFEL,

*Judge, United States District Court.*



## APPENDIX "B"

UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF OHIO, WESTERN DIVISION

No. 881

(Cincinnati)

THE BARRETT LINE, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE  
COMMISSION, Defendants

## ORDER

(Filed July 28, 1944. Harry F. Rabe, Clerk.)

This day this cause came on to be heard, and was submitted on the pleadings and the evidence and the Court having heard the arguments of counsel and being fully advised in the premises finds that the prayer of plaintiff's complaint should be and it is denied, and that the complaint herein should be dismissed.

It is, therefore, by the Court ordered, adjudged and decreed that the complaint herein be and hereby it is dismissed at plaintiff's costs. To all of which findings, rulings, judgment and decrees of the Court, plaintiff excepts.

(S.) FLORENCE E. ALLEN,

*Judge, United States Circuit Court of Appeals.*

(S.) ROBERT R. NEVIN,

*Judge, United States District Court.*

(S.) JOHN H. DRUFFEL,

*Judge, United States District Court.*



## APPENDIX "C"

This report will not be printed in full in the permanent series of Interstate Commerce Commission Reports.

## INTERSTATE COMMERCE COMMISSION

No. W-353

## BARRETT LINE, INC., CONTRACT CARRIER APPLICATION

Submitted April 19, 1943. Decided June 18, 1943

1. Applicant found not to have been in bona fide operation on January 1, 1940, and continuously since, as a common or contract carrier by water, in the performance of transportation subject to part III of the Interstate Commerce Act.

2. New operation by applicant as a contract carrier not shown to be consistent with the public interest and the national transportation policy, and present or future public convenience and necessity not shown to require new operation by it as a common carrier. Applications denied.

*Robert E. Quirk* for applicant.

*Jack B. Josselson, Harry C. Ames, Morris C. Pearson, W. G. Olephant, Stuart B. Bradley, Luther M. Walter, Charles Dondley, John S. Mason, R. Granville Curry, Frederick M. Dolan, Andrew P. Calhoun, Wilbur LaRoc, Jr., Frederick E. Brown, and Arthur L. Winn, Jr.,* for interveners.

## REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS PORTER, MAHAFFIE, AND MILLER

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed by the parties. Applicant replied to protestants' exceptions and the issues were argued orally. Our conclusions differ from those recommended by the examiner.

By application filed May 19, 1941, The Barrett Line, Inc., of Cincinnati, Ohio, seeks a permit under the provisions of section 309 (f) of the Interstate Commerce Act authorizing continuance of its operation, as a contract carrier by water, in the transportation of commodities generally except certain commodities such as livestock, perishables, currency, contaminating cargo, etc., between points on the Mississippi River and its tributaries. A subsequent application, filed as a precautionary measure, seeks authority to perform the foregoing operation as a new operation. Both applications are in the alternative and request a certificate if applicant is found to be a common carrier. A hearing was held. The American Barge Line Company, Illinois River Carriers Association, Mississippi Valley Barge Line Company, and Union Barge Line Corporation oppose the granting of the applications.

On June 30, 1942, applicant had assets of \$935,123.56 which included floating equipment valued at \$633,589.94, and United States bonds in the sum of \$256,700. It had a surplus and undivided profits of \$317,450.43 and a depreciation reserve of \$370,028.54. The equipment owned at the time of the hearing, September 1, 1942, consisted of 2 towboats, 21 barges, 2 derriek boats, and 4 small coal barges. The 2 towboats are of 900 and 1200 horsepower, respectively. At the time of the hearing 2 of the barges were being used in the coal trade, 3 in the transportation of bulk petroleum products, 6 were chartered to an oil company and were being used in the transportation of bulk petroleum products, 6 were in the process of being chartered to a shipper for the transportation of bulk petroleum products, and 4 were available for such use as applicant could find for them.

Applicant, or its predecessors, has been in operation on the Mississippi River and its tributaries for about 100 years. Ordinarily it operates under term contracts which contemplate the movement of large quantities of material over a period of time. The periods covered by such contracts are not less than 2 or 3 months, and average from 4 to 6 months. Contracts are negotiated on basis of the nature and volume of the cargo offered, the time required to make delivery, the course of the waterway, the season of the year, and other factors which might affect the cost of performing the trans-

portation. Applicant has accepted single-trip shipments where special circumstances were involved but indicates that it does not intend to operate in the ordinary "run-of-the-mine" trips.

An exhibit of record contains a description of all services performed between January 1, 1936, and August 11, 1942. During this period practically all services performed were such that they may be continued without any authorization from us because they are not subject to regulation under part III of the act. Stone, in bulk, petroleum products, in bulk, and fabricated steel and steel piling were the only commodities carried. Practically all of the stone was transported for the United States Army Engineers between points in Missouri, Illinois, Kentucky, Arkansas, and Tennessee and was used for construction work on the waterways. The transportation of bulk commodities is exempt from regulation under section 303(b). There were 7 movements of petroleum products in 1937 from Baton Rouge, La., to Louisville, Ky.; 3 movements in 1941, 1 from Vicksburg, Miss., to Grand Tower, Ill., 1 from Cairo to Alton, Ill., and 1 from Wyckoff, Ky., to Nashville, Tenn.; and 8 movements in 1942 from points in Louisiana to Midland, Pa., North Bend, Ohio, and Memphis, Tenn. The transportation of petroleum, in bulk, is exempt under the provisions of section 303(b) or (d). One shipment of fabricated steel and piling was handled in 1936 from Cairo to Genoa, Wis. There has been none since. Other services rendered during the period in question consisted of towing for other carriers or for shippers of bulk commodities, chartering vessels to carriers or to shippers, salvage operations, storage of vessels belonging to others, and furnishing steam to other vessels for boiler cleaning operations. Of the foregoing the only transportation which might be subject to regulation under part III was that of chartering of vessels to shippers. However, no showing is made as to the nature of the services rendered, the commodities carried in, or the points served with such vessels. On such meager showing we would not be warranted in finding that applicant, on January 1, 1940, and continuously since, was engaged in chartering operations subject to part III of the act. In one instance a contractor's fleet of work boats was moved which

operation was probably exempt by our order of October 29, 1941, in Ex Parte 147, *Towage of Floating Objects*.<sup>1</sup>

Applicant maintains that owing to the varying and sporadic nature of its operations it is impossible to select any limited period of its existence as representative of its business. It claims to have handled a variety of commodities in the past, such as scrap iron, pig iron, fabricated iron and steel, ties, pipe, sulphur, coal, logs, lumber, salt, grain, sand, gravel, cement, paving blocks, automobiles, and bauxite ore, and seeks authority to handle commodities generally so that it will be in a position to again handle these or similar commodities should the occasion arise.

Under the act "grandfather" rights must be predicated upon a showing of bona fide operations on January 1, 1940, and continuously since. The term "bona fide operations" has been interpreted to mean a holding out substantiated by actual operations consistent therewith. Actual operation in order to substantiate a claimed holding out on January 1, 1940, must have been within a reasonable length of time from that date. What constitutes a reasonable length of time may vary with the particular circumstances in each proceeding but one shipment made in 1936 and others at an indefinite period of time prior thereto are entirely too remote to establish bona fide operations on January 1, 1940, and continuously since. We conclude that applicant has failed to establish that it was in bona fide operation on January 1, 1940, and continuously since, in the performance of transportation subject to part III of the act.

As previously stated applicant also filed an application under the provisions of section 309(g) seeking a permit authorizing the foregoing operation as a new operation. Under that section an applicant must show that it is fit, willing, and able properly to perform the service proposed, and to conform to the provisions of part III, and the requirements, rules, and regulations of the Commission thereunder, and that such operation will be consistent with the public interest and the national transportation policy declared in the act.

<sup>1</sup> In *Towage of Floating Objects (Logs and Piling in Rafts)*, 250 I. C. C. 525, this order was vacated insofar as it applied to logs and piling in rafts.

Applicant, however, is not proposing any new operation. In fact, most of its equipment at present is being used in the transportation of bulk petroleum products. We recognize the fact that this present petroleum movement is an emergency operation occasioned by the war but even considering applicant's normal operations for a period of approximately 5 years before the war it has not shown that its operation consisted of performing other than exempt transportation, except for the one shipment of fabricated steel and piling in 1936. No evidence was submitted to show that present or future public convenience and necessity require operation by applicant in the performance of transportation subject to the act. On this record we conclude that applicant has failed to show that it is proposing any new operation, or that a new operation by it would be consistent with the public interest or the national transportation policy, or that present or future public convenience and necessity require such operation.

We find that applicant was not in bona fide operation on January 1, 1940, and continuously since, as a common or contract carrier by water, in the performance of transportation subject to the provisions of part III of the act; that it has not been shown that a new operation by applicant as a contract carrier by water would be consistent with the public interest and the national transportation policy; or that present or future public convenience and necessity require a new operation by it as a common carrier. The application, therefore, will be denied. An appropriate order will be issued.

#### ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION,  
Division 4, Held at Its Office in Washington, D. C., on the  
18th day of June, A. D. 1943

No. W-353

#### BARRETT LINE, INC., CONTRACT CARRIER APPLICATION

The Barrett Line, Inc., of Cincinnati, Ohio, having filed applications under the provisions of section 309(f) and (g) of the Interstate Commerce Act for a permit authorizing

operation by it as a contract carrier by water, a hearing having been held, and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

*It is ordered,* That said applications be, and they are hereby, denied.

*It is further ordered,* That this order shall take effect and be in force from and after September 13, 1943.

By the Commission, division 4.

W. P. BAETEL,  
*Secretary.*

[SEAL.]

(4633)